

1819161 (Migration) [2019] AATA 4646 (12 March 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1819161

MEMBER: Justine Clarke

DATE: 12 March 2019

PLACE OF DECISION: Melbourne

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Migrant) (Class BC) visa.

Statement made on 12 March 2019 at 2:44pm

CATCHWORDS

MIGRATION – Partner (Migrant) (Class BC) visa – Subclass 100 (Partner) – genuine partner relationship – relationship with sponsor ceased – unique or exceptional circumstances – referral to Minister – decision under review affirmed

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2. **LEGISLATION**
3. *Migration Act 1958 (Cth), ss 5CB(2), 5F, 65, 351*
4. *Migration Regulations 1994 (Cth), Schedule 2, cls 100.221(1), 100.221(2)(b)*

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

5. This is an application for review of a decision made by a delegate of the Minister for Immigration on 25 June 2018 to refuse to grant the visa applicant a Partner (Migrant) (Class BC) visa under s.65 of the *Migration Act 1958* (the Act).
6. The applicant, Mr [A], is a [age] year old national of Lebanon.
7. On 9 February 2015, the applicant applied for the visa on the basis of his relationship with his then sponsor, Ms [B].
8. At the time of application, Class BC contained one subclass: Subclass 100 (Partner). The criteria for the grant of a Subclass 100 visa are set out in Part 100 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. The primary criteria include cl.100.221 which essentially requires that, at the time of decision, the applicant is the spouse or de facto partner of the sponsor, unless the relationship has ceased and certain circumstances exist.
9. The applicant provided the Tribunal with a copy of the primary decision. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.100.221(1) of Schedule 2 to the Regulations because he did not meet cl.100.221(2), (2A), (3), (4) or (4A). The primary decision states that:
 - On 21 March 2018, the sponsor notified the Department that her relationship with the applicant had ceased. (This information was confirmed in subsequent emails dated 4 and 5 April 2018).
 - On 12 April 2018, the Department wrote to the applicant requesting his comment on the change to his relationship status and advising of the criteria that must be met to continue with the application.
 - As at 25 June 2018 (the date of the Department's refusal decision), the Department had not received a response from the applicant.
10. On 12 March 2019, the applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's current wife, Ms [C] and her parents Mr [D] and Mrs [E]. Ms [C]'s brother [Mr F] attended but did not give evidence. The hearing was conducted with the assistance of an interpreter in the Arabic (Lebanese) and English languages. The applicant was represented in relation to the review by his registered migration agent and the representative attended the Tribunal hearing.
11. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

12. The issue is whether, at the time of this decision, the applicant is a spouse or de facto partner of the sponsor, or in the event that the relationship has ceased, that certain circumstances exist, as provided for in cl.100.221(3) or (4).
- 13.

14. Whether the parties are in a spouse or de facto relationship

15. Clause 100.221 requires that the applicant meet one of five alternative requirements. These include cl.100.221(2) and (2A) which require, among other things, that at the time of this decision, the applicant is the spouse or de facto partner of the 'sponsoring partner'. Unless the applicant was granted a Subclass 309 visa by Ministerial intervention, the 'sponsoring partner' is the person who was specified as the applicant's spouse or de facto partner or intended spouse or de facto partner in the related Subclass 309 application, being an Australian citizen, permanent resident or eligible New Zealand citizen.
16. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)–(d).
17. 'De facto partner' is defined in s.5CB of the Act, which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
18. In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), in the case of a spouse relationship, and as set out in r.1.09A(3) in the case of a de facto relationship.

Are the parties in a partner relationship?

19. As stated earlier, the applicant provided the Tribunal with a copy of the primary decision which indicates that the applicant sought the visa on the basis of his relationship with the sponsor but that on 21 March 2018 the Department received advice that the relationship had ended.
20. The primary decision places the applicant on notice that the ongoing nature of the relationship is at issue.
21. Since the primary decision, the applicant has presented no documentary evidence to show that he continues to be in a relationship with the sponsor. At the time of this decision, there is no evidence before the Tribunal that the applicant and the sponsor:
 - share their finances, have joint liabilities or jointly contribute to expenses;
 - maintain a joint household or share housework—indeed, that they do not live separately and apart on a permanent basis;
 - continue to represent themselves to others as being in a relationship or that they socialise together; and
 - draw companionship and support from each other or continue to have a mutual commitment to the relationship.

22. To the contrary, the written submissions of 8 March 2019 explained that the parties had separated and the applicant has provided a copy of the certificate of divorce which took effect on 25 June 2018 (Tribunal file f.67).
23. The submissions continued:
24. We are instructed that Ms [B] has not passed away, there was no family violence and there are no children of the relationship, which could enliven Regulation 100.221.
25. We acknowledge that Mr [A] will not be successful in this application as he does not meet the criteria for the permanent Partner visa with Ms [B], as the sponsoring partner.
26. The applicant also conceded these points when giving his oral evidence at the hearing.
27. **Conclusion**
28. Having considered the evidence before the Tribunal and the concessions made by the applicant, the Tribunal makes the following findings.
29. At the time of this decision, on the basis of the information and evidence before the Tribunal, the Tribunal is:
- satisfied that the applicant and the sponsor are not in a married relationship with each other for the purposes of s.5F of the Act;
 - satisfied that the applicant and the sponsor are not related by family for the purpose of s.5CB(2)(d) of the Act;
 - not satisfied that the applicant and the sponsor have a mutual commitment to a shared life to the exclusion of all others, as required by s.5CB(2)(a) of the Act;
 - not satisfied that the applicant and the sponsor have a genuine and continuing relationship, as required by s.5CB(2)(b) of the Act; and
 - not satisfied that the applicant and the sponsor live together, or do not live separately and apart on a permanent basis, as required by s.5CB(2)(c) of the Act.
30. Given these findings, the Tribunal is not satisfied that the requirements of s.5CB(2) are met at the time of this decision. Therefore the applicant does not meet cl.100.221(2)(b).
31. Further, the applicant has not claimed, and there is no evidence before the Tribunal, that he meets the alternative criteria in cl.100.221(2A), (3), (4) or (4A).
32. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa. Accordingly, the Tribunal must affirm the decision under review.

33. **OTHER ISSUES**

34. **Consideration of request for referral to the Minister for intervention**

35. Section 351 of the Act provides that, if the Minister thinks that it is in the public interest to do so, the Minister may substitute for a decision of the Tribunal another decision, being a

decision that is more favourable to the applicant, whether or not the Tribunal had the power to make that other decision.

36. The written submissions of 8 March 2019 (Tribunal file ff.68–73) submit that this is a case that exhibits a number of unique or exceptional circumstances such that the Minister may consider exercising his discretion and also that there are a number of factors which weigh in favour of referring this matter to the Minister, including that the applicant's current wife, Ms [C], who is a permanent resident of Australia and a [specified] Visa holder, is almost [number] months pregnant with their first child, due on [date] 2019.
37. At the hearing, the representative sought to make an additional submission which was that Mrs [E]'s pregnancy would mean that Ms [C] would not be able to rely on her mother for support after the birth of her first child because Mrs [E] would also be caring for a newly born child herself. The representative informed the Tribunal that Mrs [E] was due to give birth in the week of the Tribunal hearing. As Mrs [E] appeared to be in the very late stages of her pregnancy, the Tribunal did not consider it necessary to request corroborating documentary evidence about her pregnancy.
38. The applicant submitted a number of documents in support of the submissions (Tribunal file ff.47–67 and 75–76) and provided further documentary evidence at the hearing (ff. 78–79).
39. The applicant, Ms [C], Mr [D] and Mrs [E] gave oral evidence in support of the applicant's request for the Tribunal to refer the matter to the Minister for his consideration. It was clear that Ms [C]'s family support her relationship with the applicant.
40. In deciding whether to refer the matter to the Minister for consideration under s.351, the Tribunal has had regard to the President's Direction *Conducting Migration and Refugee Reviews*, especially at paragraphs 16.1–16.7 concerning referrals for ministerial intervention and the *Minister's Guidelines on ministerial powers (s345, s351, s391, s417, s454 and s501J)* available in the Procedures Advice Manual 3 ('the Minister's Guidelines').
41. The Tribunal was impressed by the credibility of all persons who gave oral evidence at the hearing and accepts the validity of the oral evidence and submissions that were made. Examining the relevant factors individually and cumulatively, the Tribunal considers that this is a case where it would be appropriate to make a referral to the Minister.

DECISION

42. The Tribunal affirms the decision not to grant the applicant a Partner (Migrant) (Class BC) visa.

Justine Clarke
Member